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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 PAUL ADAMS,
12 CDCR #F-92755,

13 Plaintiff,

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16 vs.
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19 DR. ARAB; AL LOPEZ; K. BALL;
20 D. HJERPE; J. WALKER; LARRY
21 SMALL; STATE OF CALIFORNIA;
22 UNITED STATES FEDERAL
23 GOVERNMENT; DOES 1-20,
24
25
26

27 Defendants.
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Civil No. 10cv0706 MMA (BLM)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED IN
FORMA PAUPERIS, IMPOSING
NO INITIAL PARTIAL FILING
FEE AND GARNISHING BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)**

[Doc. No. 2]

**(2) SUA SPONTE DISMISSING
COMPLAINT PURSUANT TO
28 U.S.C. §§ 1915(e)(2) & 1915A(b);
AND**

**(3) DENYING MOTION FOR
COURT TO SERVE SUMMONS AS
MOOT**

[Doc. No. 3]

27 Paul Adams ("Plaintiff"), a state prisoner currently incarcerated at Calipatria State Prison
28 located in Calipatria, California and proceeding pro se, has filed a civil rights action pursuant

1 to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C.
 2 § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28
 3 U.S.C. § 1915(a) [Doc. No. 2]. In addition, Plaintiff has filed a “Motion for Court to Serve
 4 Summons Upon the Defendants.” [Doc. No. 3]

5 **I. MOTION TO PROCEED IFP [DOC. NO. 2]**

6 All parties instituting any civil action, suit or proceeding in a district court of the United
 7 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 8 U.S.C. § 1914(a). Prisoners granted leave to proceed IFP remain obligated to pay the entire fee
 9 in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C.
 10 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

11 Section 1915, as amended by the Prison Litigation Reform Act (“PLRA”), further
 12 requires that each prisoner seeking leave to proceed IFP submit a “certified copy of [his] trust
 13 fund account statement (or institutional equivalent) ... for the six-month period immediately
 14 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2). The institution having custody
 15 of the prisoner must collect payments, assessed at 20% of the preceding month’s income, in any
 16 month in which his account exceeds \$10, and forward those payments to the Court until the
 17 entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

18 The Court finds that Plaintiff has submitted a certified copy of his prison trust account
 19 statement pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. Plaintiff’s trust account
 20 currently indicates that he has insufficient funds from which to pay an initial partial filing fee.
 21 Thus, the Court hereby **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 2], and assesses
 22 no initial partial filing fee at this time. *See* 28 U.S.C. § 1915(b)(1). However, Plaintiff is
 23 required to pay the full \$350 filing fee mandated by 28 U.S.C. §§ 1914(a) and 1915(b)(1), by
 24 subjecting any future funds credited to his prison trust account to the installment payment
 25 provisions set forth in 28 U.S.C. § 1915(b)(2).

26 **II. SUA SPONTE SCREENING PER 28 U.S.C. §§ 1915(e)(2) & 1915A**

27 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 28 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused

1 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 2 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
 3 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 4 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion
 5 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from
 6 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203
 7 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,
 8 446 (9th Cir. 2000) (§ 1915A).

9 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
 10 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is
 11 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,
 12 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing
 13 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of
 14 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection
 15 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint
 16 that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
 17 (discussing 28 U.S.C. § 1915A).

18 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 19 allegations of material fact and must construe those facts in the light most favorable to the
 20 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 21 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
 22 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,
 23 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
 24 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

25 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
 26 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
 27 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
 28 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*

1 other grounds by *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d
2 1350, 1354 (9th Cir. 1985) (en banc).

3 First, Plaintiff names the State of California as a Defendant in this matter. The State of
4 California is entitled to absolute immunity from monetary damages actions under the Eleventh
5 Amendment. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53-54 (1996); *Pennhurst*
6 *State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *see also Hale v. State of Arizona*,
7 993 F.2d 1387, 1398-99 (9th Cir. 1993) (holding that a state department of corrections is not a
8 “person” within the meaning of § 1983). In order to state a claim under § 1983, Plaintiff must
9 identify a “person” who, acting under color of state law, deprived him of a right guaranteed
10 under the Constitution or a federal statute. *See* 42 U.S.C. § 1983.

11 Therefore, Plaintiff’s claims for monetary damages against the State of California are
12 **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii).

13 Based on the Exhibits attached to Plaintiff’s Complaint, it appears that he suffered from
14 a gunshot wound in 1997 and the “bullet was left in on the left side of [Plaintiff’s] neck.”
15 *See* Compl., Ex. 1, Interdisciplinary Progress Note dated May 6, 2008. Plaintiff alleges that the
16 pain from the bullet worsened over time and he was scheduled for surgery to remove the bullet.
17 *See Id.* at 4. Plaintiff was examined by Dr. Arab, who was to perform the surgery, on three
18 occasions. *Id.* However, Plaintiff believes that Dr. Arab refused to answer his questions and
19 that he was “mean and moody and hated being in the prison office helping people.” *Id.* Plaintiff
20 then sought assistance from Dr. Lopez who informed Plaintiff that his questions regarding his
21 surgery were “irrelevant.” *Id.* at 5.

22 In order to assert a claim for inadequate medical care, Plaintiff must allege facts which
23 are sufficient to show that each person sued was “deliberately indifferent to his serious medical
24 needs.” *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Estelle v. Gamble*, 429 U.S. 97, 106
25 (1976). Prison officials must purposefully ignore or fail to respond to Plaintiff’s pain or medical
26 needs. *Estelle*, 429 U.S. at 105-06. Thus, to state a claim, Plaintiff must allege facts sufficient
27 to show both: (1) an objectively “serious” medical need, i.e., one that a reasonable doctor would
28 think worthy of comment, one which significantly affects his daily activities, or one which is

1 chronic and accompanied by substantial pain, *see Doty v. County of Lassen*, 37 F.3d 540, 546
2 (9th Cir. 1994); and (2) a subjective, and “sufficiently culpable” state of mind on the part of
3 each individual Defendant. *See Wilson v. Seiter*, 501 U.S. 294, 302 (1991). In other words,
4 Plaintiff must plead facts that show Defendants knew of his “serious” need for medical attention
5 and that each one nevertheless disregarded his need despite the excessive risk posed to his
6 health. *See Farmer*, 511 U.S. at 837.

7 The indifference to medical needs also must be substantial; inadequate treatment due to
8 malpractice, or even gross negligence, does not amount to a constitutional violation. *Estelle*, 429
9 U.S. at 106; *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990). Moreover, a mere
10 difference of opinion between an inmate and prison medical personnel regarding appropriate
11 medical diagnosis and treatment are not enough to establish a deliberate indifference claim.
12 *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). Here, Plaintiff’s allegations and the
13 documents attached to his Complaint indicate that prison officials did offer to perform surgery
14 for his medical condition. Plaintiff rejected the surgery because he did not believe that Dr. Arab
15 was answering his questions in a satisfactory manner. The claims in Plaintiff’s Complaint reflect
16 a disagreement between his prison doctors and Plaintiff, and thus, these claims simply do not
17 rise to the level of “deliberate indifference.” Accordingly, Plaintiff’s Eighth Amendment
18 inadequate medical care claims are **DISMISSED** for failing to state a claim upon which relief
19 could be granted. *See* 28 U.S.C. § 1915(e)(2) & § 1915A.

20 Plaintiff also names a number of Defendants that he appears to seek to hold liable in their
21 supervisory capacity. However, there is no respondeat superior liability under 42 U.S.C. § 1983.
22 *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into
23 causation must be individualized and focus on the duties and responsibilities of each individual
24 defendant whose acts or omissions are alleged to have caused a constitutional deprivation.” *Leer*
25 *v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71
26 (1976)). In order to avoid the respondeat superior bar, Plaintiff must allege personal acts by each
27 individual Defendant which have a direct causal connection to the constitutional violation at
28

1 issue. *See Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040,
2 1045 (9th Cir. 1989).

3 Supervisory prison officials may only be held liable for the allegedly unconstitutional
4 violations of a subordinate if Plaintiff sets forth allegations which show: (1) how or to what
5 extent they personally participated in or directed a subordinate's actions, and (2) in either acting
6 or failing to act, they were an actual and proximate cause of the deprivation of Plaintiff's
7 constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As currently pled,
8 however, Plaintiff's Complaint fails to set forth facts which might be liberally construed to
9 support an individualized constitutional claim against any of the supervisory defendants.

10 Accordingly, the Court finds that Plaintiff's Complaint fails to state a section 1983 claim
11 upon which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C.
12 §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an opportunity to amend
13 his pleading to cure the defects set forth above. Plaintiff is warned that if his amended complaint
14 fails to address the deficiencies of pleading noted above, it may be dismissed with prejudice and
15 without leave to amend.

16 **III. CONCLUSION AND ORDER**

17 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

18 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is
19 **GRANTED.**

20 2. The Secretary of California Department of Corrections and Rehabilitation, or his
21 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
22 owed in this case by collecting monthly payments from the account in an amount equal to twenty
23 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
24 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
25 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
26 ASSIGNED TO THIS ACTION.

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3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate, Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502, Sacramento, California 95814.

IT IS FURTHER ORDERED that:

4. Plaintiff's claims for monetary damages against the State of California are **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii).

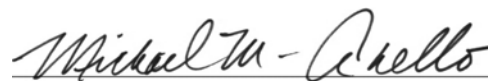
5. The remainder of Plaintiff's Complaint is **DISMISSED** without prejudice for seeking monetary damages against immune defendants and for failing to state a claim upon which relief could be granted. *See* 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a First Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S.D.CAL.CIVLR. 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief may be granted, it may be dismissed without further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

5. Plaintiff's Motion for Court to Serve Summons Upon the Defendants [Doc. No. 3] is **DENIED** as moot.

6. The Clerk of the Court is directed to mail a form civil rights § 1983 complaint to Plaintiff.

DATED: May 6, 2010



Hon. Michael M. Anello
United States District Judge